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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 486.

PANHANDLE EASTERN PIPE LINE COMPANY,
Appellant,

against

MICHIGAN PUBLIC SERVICE COMMISSION AND MICHIGAN CONSOLIDATED GAS COMPANY,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN.

APPELLANT'S BRIEF ANSWERING MOTIONS TO DISMISS OR AFFIRM.

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This brief is submitted in behalf of the appellant, Panhandle Eastern Pipe Line Company, in opposition to motions of Michigan Consolidated Gas Company and Michigan Public Service Commission, appellees, to dismiss this appeal or to affirm the judgment below.

Facts.

The essential facts can be covered in ten concise sentences.

Panhandle owns and operates a natural gas pipe line stretching from gas wells in Texas, Oklahoma and Kansas

to Michigan. It transports natural gas in interstate commerce and is a "natural gas company" subject to regulation by the Federal Power Commission under the Natural Gas Act.

The company made a contract to sell and deliver direct from its main line 25,000 m. c. f. of natural gas a day to the Ford Motor Company at Dearborn, Michigan, for the Ford Company's own consumption in its industrial plant,—a so-called "direct industrial sale". The Ford plant is located in a municipality already served with gas by Michigan Consolidated Gas Company.

The Michigan Public Service Commission (on complaint of Michigan Consolidated and after hearing) issued an order commanding Panhandle to cease and desist from making direct sales of natural gas to industries in Michigan. The Commission's order was issued under purported authority of a Michigan statute, to the effect that no public utility may render any service in any municipality where any other utility is engaged in rendering the same sort of service unless it shall first obtain a certificate of public convenience and necessity. Act 69, section 2, Public Acts of 1929 of Michigan.

Panhandle, looking to the state courts for relief and following Michigan statutory procedure, brought suit in equity in the Michigan Circuit Court to enjoin enforcement of the order, pressing the point that the sale was a sale of natural gas in interstate commerce and that the Michigan statute as construed and applied by the order of the Public Service Commission was in violation of the Commerce Clause of the Constitution.

The Circuit Court, in setting aside the Commission's order, held that the sale of the natural gas in question was a sale in interstate commerce, and that while a sale to a direct industrial consumer was subject to state regulation

on rates and service, the right to regulate did not embrace the power to prohibit.

But on appeal the judgment of the Circuit Court was reversed by the Supreme Court of Michigan (three justices dissenting), and the Commission's order was affirmed, 328 Mich. 650 (advance sheets.)

This appeal was allowed by the Supreme Court of Michigan.

Present Motions.

The asserted grounds of the motions to dismiss or affirm are :

1. It is urged that the judgment of the Michigan Supreme Court is not a final judgment upon which an appeal can be based under 28 U. S. Code, section 1257.

2. It is urged that no substantial Federal question is involved.

The motion and supporting arguments in the Statements Opposing Jurisdiction are, we submit, utterly lacking in merit.

POINT I.

The judgment is final.

The Michigan Public Service Commission issued an order to Panhandle to cease and desist from making direct sales of natural gas to industries in Michigan in the absence of a certificate of public convenience and necessity. The ordering clause in the Commission's order was that Panhandle

> "cease and desist from making direct sales and deliveries of natural gas to industries within the State of Michigan, located within municipalities

already being served by a public utility, until such time as it shall have first obtained a certificate of public convenience and necessity from this Commission to perform such services."

The Commission's order placed a command on Panhandle. The order terminated this particular proceeding in every sense, save of course for the possibility of relief by appeal or review. No issue in the case was left undecided.

The Supreme Court of Michigan (three justices dissenting) affirmed the Commission's order.

That judgment is a final judgment of the highest court of Michigan. It marks the end of the lawsuit, except for this appeal. No branch of the case was sent back for further proceedings. No "loose ends remain to be tied up", *Republic Gas Co.* v. *Oklahoma*, 334 U. S. 62, 68 (1948). In the Michigan courts the judgment closed the case—period.

By every test of finality under 28 U. S. Code, section 1257, the judgment is "final."

Richfield Oil Corp. v. *State Board of Equalization*, 329 U. S. 69 (1946);

Panhandle Eastern Pipe Line Co. v. *Public Service Commission of Indiana*, 332 U. S. 507 (1947);

Republic Gas Co. v. *Oklahoma*, 334 U. S. 62 (1948);

La Crosse Telephone Corporation v. *Wisconsin Employment Relations Board*, 336 U. S. 18 (1949).

The appellees have argued that this appeal is premature because Panhandle, so they say, may still see fit to go before the Commission and try to get a certificate.

But that would require commencement of a new and independent proceeding by Panhandle before the Commission, a proceeding that would raise an issue quite different

from the issue decided in the present case. No such proceeding has been commenced.

Plainly, the possibility of starting a new proceeding of that character does not affect the finality of the existing judgment. An authority directly in point is *Largent* v. *Texas*, 318 U. S. 418 (1943), where the court said (pp. 421-422):

> "The possibility that the appellant might obtain release by a subsequent and distinct proceeding, and one not in the nature of a review of the pending charge, in the same or a different court of the State does not affect the finality of the existing judgment * * *."

The same point was decided in *Detroit & Mackinac Ry. Co.* v. *Michigan R. R. Commission*, 240 U. S. 564 (1916), where the court said (p. 571):

> "But, as this court has said, 'all judgments and decrees which determine the particular cause' are final in the sense of the statute."

Likewise, the argument that the judgment is not final because Panhandle might still commence a proceeding to obtain a certificate is completely answered by the decisions holding that judgments of the highest state court in suits for mandamus or prohibition are final and appealable, it being a matter of no moment that related isues in other suits may not have been determined.

Mt. Vernon-Woodberry Cotton Duck. Co. v. *Alabama Interstate Power Co.*, 240 U. S. 30 (1916);

Missouri ex rel. St. Louis R. Co. v. *Taylor*, 266 U. S. 200 (1924);

Bandini Co. v. *Superior Court*, 284 U. S. 8 (1931);

Rescue Army v. *Municipal Court*, 331 U. S. 549 (1947).

POINT II.

A substantial Federal question is involved.

The Federal question is this: Does a Michigan statute which prohibits the sale of natural gas to a consumer in an area already being served without first obtaining a certificate of public convenience and necessity—which statute has been construed by the Michigan Supreme Court in this case to apply to a sale of natural gas in movement in interstate commerce—violate the Commerce Clause of the Constitution? This, in a case where the statutory purpose is to prevent competition and where a certificate may be granted or denied in the discretion of the Public Service Commission of the State.

The power here asserted over interstate commerce in natural gas is the power to prohibit. Manifestly, if the state may make its consent necessary, it may withhold consent.

The sound distinction, we submit, is between the power of the state *to regulate rates and conditions of service* in a sale of natural gas in interstate commerce to a direct industrial consumer (a power which we acknowledge) and the power here asserted *to prohibit* such sales altogether.

This Court has repeatedly held that the power of the states to regulate interstate commerce does not comprehend the power to obstruct or prohibit.

> *Barrett* v. *New York*, 232 U. S. 14 (1914);
> *Sault Ste. Marie* v. *International Transit Co.*, 234 U. S. 333 (1914);
> *Buck* v. *Kuykendall*, 267 U. S. 307 (1925);
> *Bush and Sons Co.* v. *Maloy*, 267 U. S. 317 (1925);
> *Hood & Sons* v. *DuMond*, 336 U. S. 525 (1949).

In the above cases this Court held that a state could not require a permit, license or certificate of public convenience

and necessity in cases of interstate commerce. They control the present case.

A word about *Panhandle Eastern Pipe Line Co.* v. *Indiana Public Service Commission*, 332 U. S. 507 (1947). The Michigan Supreme Court considered that decision to govern this situation. Plainly it does not. That was a "rates and service" case.

In the *Indiana* case the background facts were the same as here, but there the state commission sought simply to regulate rates and service incident to sales of natural gas in interstate commerce to direct industrial users. This Court held that the states had that power. In the present case, however, the State claims the power to prohibit such sales altogether.

As the dissenting justices in this case pointed out:

> "Nowhere in the opinion (in the Indiana case) is it suggested that the Indiana commission sought to require, or that the court was upholding the right of the commission to require, plaintiff to obtain a certificate of public convenience and necessity before making, in Indiana, the sales in interstate commerce there involved."

Conclusion.

The motions to dismiss the appeal or to affirm are without merit. The Court, we submit, should note probable jurisdiction and set the case for oral argument.

Respectfully submitted,

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